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Nos. 07-608, 08-328

IN THE
# Supreme Court of the United States

FRANK RICCI, ET AL.,

*Petitioners,*

v.

JOHN DESTEPHANO, ET AL.,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF OF AMICUS CURIAE EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONER

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## INTEREST OF AMICUS CURIAE[1]

Eagle Forum Education and Legal Defense Fund ("Eagle Forum ELDF") is an Illinois nonprofit corporation. For over twenty years it has defended principles of limited government, individual liberty, and moral virtue. To ensure the guarantees of individual liberty enshrined in our written Constitution, Eagle Forum ELDF advocates that the Constitution be interpreted according to its original meaning. Eagle Forum ELDF therefore has a strong interest in protecting the right of individuals to be free of state-sponsored racial discrimination, which is expressly prohibited under the Equal Protection Clause of the Fourteenth Amendment.

## SUMMARY OF THE ARGUMENT

The court of appeals erred in granting summary judgment on both Petitioners' Equal Protection Clause and Title VII claims. Petitioners were in line to receive promotions based on a testing process implemented by the City of New Haven until Respondents made a decision to dispense with the test results based entirely upon Petitioners' racial identities. Such behavior is racial discrimination subject to Equal Protection Clause and Title VII scrutiny, and Respondents have offered no valid justification for such discrimination in this case.

The court of appeals' Equal Protection Clause analysis rested on the notion that racially-motivated decision-making is immune from the guarantees found in the Fourteenth

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[1] This brief is filed in accordance with the global consent letters filed by Petitioners and Respondent with this Court. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

Amendment if a state actor merely refuses to give anyone a benefit because of the race of those in line for that benefit. This holding cannot be squared with the text or history of the Fourteenth Amendment, or this Court's precedents. Each of those sources teach that the Equal Protection Clause absolutely prohibits any race-based decision making that disadvantages individuals based on their race.

The court of appeals' Title VII analysis was also flawed. By holding that any statistical disparity in test results falling below the EEOC's "four-fifths rule" created a prima facie case of disparate impact sufficient to justify voluntary race-based remedial action, the court of appeals undercut the express intent of Congress that disparate impact analysis should not encourage racial quotas or discourage the use of genuine professionally-developed, job-related employment tests. At the same time, it interpreted Title VII in a way that brought it into conflict with the clear dictates of the Fourteenth Amendment.

The facts of this case and the court of appeals' holding demonstrate the need to clarify the standards for establishing a disparate impact claim. The vague standards articulated by some courts have contributed to an atmosphere where employers feel they must choose between implementing racial quotas (either overtly or surreptitiously) or facing a costly disparate impact lawsuit. Respondents argue that this dilemma forced them to retroactively invalidate their professionally-developed test and refuse to promote anyone. Instead of embracing such a perverse result, this Court should clarify Title VII disparate impact analysis to bring it in line with Congress's expressed intention to prohibit racial quotas while encouraging and protecting genuine professionally-developed, job-related employment tests.

## ARGUMENT

### I. The Court of Appeals Erred In Failing To Subject Respondents' Actions To Strict Scrutiny Under The Equal Protection Clause.

The text, the original understanding, and this Court's precedents unequivocally demonstrate that individuals have a right not to have state actors classify them by race and then subject them to disadvantages because of their race. Petitioners were unquestionably disadvantaged in the promotion process solely because of their race. Nonetheless, the Court of Appeals held that no racial classification had been made, and thus did not subject Respondents' acts to any Equal Protection scrutiny. Pet. App. 45a-46a. This was based on the flawed view that it is constitutionally permissible to evaluate whether the successful candidates in a selection process are of a certain acceptable racial mix, and, if not, to refuse to hire or promote them. Because this holding allows the city to disadvantage certain individuals based entirely on their race—as Petitioners indisputably were here—it is inconsistent with the text and original understanding of the Equal Protection Clause, as well as the this Court's settled precedent.

#### A. The Court Of Appeals' Holding Is Inconsistent With The Plain Language Of The Equal Protection Clause.

The starting point for interpreting any constitutional provision is its text. *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). The Equal Protection Clause of the Fourteenth Amendment provides: "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. A straightforward reading of the Clause makes clear that it prohibits state governments from treating citizens differently based on their race, regardless of whether that racial discrimination is accomplished by overt

or surreptitious means. *See* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1144 (1992); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 82 (1990) ("The text itself demonstrates that the equality under law was the primary goal" of the Equal Protection Clause.).

This plain meaning is confirmed by the contemporaneous statements of the key drafters and advocates of the Equal Protection Clause who uniformly believed that it would abolish all distinctions based on race. *See, e.g.*, 3 Cong. Rec. 945 (1875) (Statement of Rep. John Lynch) ("The duty of the law-maker is to know no race ... except to prevent distinctions on any [such] grounds, so far as the law is concerned."); 2 Cong. Rec. 4083 (1874) (Statement of Sen. Daniel Pratt) ("[F]ree government demands the abolition of all distinctions" based on race); Cong. Globe, 42d Cong., 2d Sess. 3260 (May 9, 1872) (Statement of Sen. Edmunds) (calling it is a "slave doctrine" to believe that "color and race are reasons for distinctions among citizens"); *see also* HORACE EDGAR FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 87 (1908, 1965) (discussing Senator Jacob Howard's characterization of the Fourteenth Amendment on the floor of the Senate as establishing equality before the law); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 993 (1995) (concluding that the framers of the Equal Protection Clause understood it to mean that "legally enforceable civil rights are the same" for everyone without regard to race).

The text and history of the Equal Protection Clause, thus "leave[] no room for doubt that laws treating people differently because of their race are invalid." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 96 n.1 (1990) (Scalia, J., dissenting). Because Respondents denied Petitioners of promotions that they would have received if they had been of

a different race, their actions must be subjected to strict scrutiny under the Equal Protection Clause.

### B. The Court Of Appeals' Holding Is Inconsistent With This Court's Equal Protection Clause Precedents.

The court of appeals' refusal to subject Respondents' actions to Equal Protection scrutiny is also contrary to this Court's precedents. The Court has repeatedly emphasized that whenever any individual "is disadvantaged by the government because of his or her race, whatever that race may be," a constitutional injury has occurred, and the challenged government action must survive strict scrutiny. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 230 (1995); *see Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (subjecting actions "rest[ing] solely upon distinctions drawn according to race" to "'the most rigid scrutiny'"); *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (holding that "all governmentally imposed discrimination" is barred by the Fourteenth Amendment); *Shaw v. Reno*, 509 U.S. 630, 642 (1993) (identifying the prevention of "States from purposefully discriminating between individuals on the basis of race" as the "central purpose" of the Fourteenth Amendment); *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 127 S. Ct. 2738, 2751 (2007) ("It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.").

Although the court of appeals recognized that Petitioners were denied promotions that they would otherwise receive based solely on Respondents' racially-motivated decisions, it

inconsistently held that Respondents' actions were not subject to Equal Protection Clause scrutiny. Pet. App. 45a-47a. Because Respondents used "individual racial classifications" to "distribute[] burdens," *Parents Involved*, 127 S. Ct. at 2751, and caused each Petitioner to be "disadvantaged ... because of his or her race," *Adarand*, 515 U.S. at 230, their decision to bar all promotions because of the racial identities of the successful candidates must be subjected to strict scrutiny. *See Williams v. Consolidated City of Jacksonville*, 341 F.3d 1261, 1269 (11th Cir. 2003) (holding that "a decision not to create new positions ... based solely upon the race ... of the next eligible candidates" violates the Equal Protection Clause); *see also Dean v. City of Shreveport*, 438 F.3d 448 (5th Cir. 2006) (reversing dismissal of white firefighter applicants' equal protection claims where there was no constitutionally valid basis for city's refusal to hire); *Quinn v. City of Boston*, 325 F.3d 18 (1st Cir. 2003) (city violated Equal Protection Clause in refusing to hire top-scoring white candidates); *Dallas Fire Fighters Ass'n v. Dallas*, 150 F.3d 438 (5th Cir. 1998) (promotion of women and minorities over more qualified white male candidates violated Equal Protection Clause); *Maryland Troopers Ass'n v. Evans*, 993 F.2d 1072 (4th Cir. 1993) (Equal Protection Clause forbids racial quotas in police hiring and promotions). Because the court of appeals failed to do so, its decision should be reversed.

## II. The Court Of Appeals Erred In Holding That Respondents' Discriminatory Acts Did Not Violate Title VII.

Although the court of appeals acknowledged that a jury could find that Respondents' actions were motivated by Petitioners' race, Pet. App. 24a-25a, it held that those actions were immune from Title VII liability because "a statistical showing of discrimination, and particularly a pass rate below the 'four-fifths rule,' is sufficient to make out a prima facie

case of discrimination [for hypothetical plaintiffs], and therefore sufficient to justify voluntary race-conscious remedies." Pet. App. 38a. This holding is contrary to the text of Title VII, and this Court's precedents, and should be rejected. Moreover, it is based on an interpretation of Title VII that would bring it into direct conflict with the plain language of the Equal Protection Clause. The confusion manifested by both the court of appeals and Respondents shows the need for clarification of Title VII's disparate impact provisions to prevent government encouragement and sanction of racial quotas that are plainly contrary to the intent of Congress and the text of Title VII.

### A. The Court Of Appeals' Holding Is Contrary To The Text of Title VII And This Court's Precedents.

Nothing in the text of Title VII provides an immunity for race-conscious remedial action based solely on statistical disparities in the results of a job-related test. To the contrary, several provisions manifest a clear congressional intent to avoid such an interpretation, as it comes perilously close to endorsing and enabling pure racial quotas, which Congress "clearly and emphatically" rejected in 42 U.S.C. § 2000e-2(j). *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 993 (1988) (plurality).

Title VII states that employers may not "fail or refuse to hire" or otherwise discriminate against an individual in the "terms, conditions, or privileges of employment, because of such individual's race." 42 U.S.C. § 2000e-2(a)(1). Moreover, Congress inserted two separate provisions in Title VII specifically designed to protect genuinely job-related tests from manipulation to achieve racial quotas. First, subsection (h) states that it is not an unlawful employment practice "to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed,

intended or used to discriminate..." 42 U.S.C. § 2000e-2(h). Second, subsection (l) specifically seeks to protect such employment tests from any manipulation by prohibiting an employer from "adjust[ing] the scores of, us[ing] different cutoff scores for, or otherwise alter[ing] the results of, employment related tests on the basis of race..." 42 U.S.C. § 2000e-2(l). The court of appeals' ruling here would open the door to racial quotes through "voluntary compliance," despite Congress's expressed intent to avoid requiring racial quotas in subsection (j), and to enable and protect job-related employment tests from legal challenge or racial manipulation in subsections (h) and (l).

The *Watson* plurality warned against precisely such an interpretation of Title VII, which would encourage an employer to discuss its employment practices in "euphemistic terms," while being "careful to ensure that the quotas are met." *Watson*, 487 U.S. at 993. "Allowing the evolution of disparate impact analysis to lead to this result would be contrary to Congress' clearly expressed intent." *Id.*

Then-Justice Rehnquist's dissent from the denial of certiorari in *Bushey v. New York State Civil Service Comm'n*, 469 U.S. 1117 (1985) is also instructive – and prescient. The Second Circuit's opinion in *Bushey*, upon which the court of appeals relied heavily here, *see* Pet. App. 37a-40a, approved race-norming of employment test scores motivated by the fear of a potential disparate impact lawsuit based simply on the fact that the racial breakdown of the test results did not comply with the EEOC's "four-fifths rule."[2] 733 F.2d 220, 225-228 (2d Cir. 1984). Justice Rehnquist, in dissent from

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[2] Although the court of appeals acknowledges that the race-norming practice upheld in *Bushey* was subsequently prohibited in the 1991 amendments to Title VII, which added subsection (l), it persisted in giving *Bushey* precedential weight because it asserted that "the 1991 amendments do not affect the reasoning and holding" of *Bushey*. Pet. App. 38a-39a n. 9.

the denial of certiorari, addressed the Second Circuit's "voluntary compliance" rationale, noting how quickly it could collapse into outright racial quotas and discrimination against certain candidates:

> Although voluntary compliance is a laudable goal, Members of this Court have recognized on other occasions that "affirmative action" plans must be policed to prevent the practice of discrimination for discrimination's sake, and to protect the interests of innocent third parties. These interests will not be sufficiently protected if agencies charged with discrimination may simply cave in to the allegations without even considering justifications for, or attempting to justify, their original employment decisions, particularly where the allegations are based only upon disparate impact.

*Bushey*, 469 U.S. at 1120-21 (internal citations omitted).

Chief Justice Rehnquist's warning appears especially prescient in light of the court of appeals' dismissal here of the subsection (h) safe-harbor for professionally-developed, job-related employment tests. Instead of requiring Respondents to give serious consideration to whether their test fell within that safe harbor, the court of appeals simply dismissed the safe harbor as providing a potential "defense" to a disparate impact claim. Pet. App. 29a-30a. It does not appear that the court of appeals required any good faith belief that this "defense" would be unavailing. Instead, despite Congress's clear intent to protect the integrity of such tests, the court of appeals granted permission to disregard them based solely on a desire to achieve a racial balance more satisfying to one group of potential plaintiffs, regardless of the effect on other candidates.

The court of appeals' decision therefore sanctions, and indeed encourages, precisely the type of "inappropriate prophylactic measures" that the *Watson* plurality was attempting to avoid, 487 U.S. at 992, which Chief Justice Rehnquist warned against, and which Congress specifically repudiated in subsections (h), (j), and (l). Its decision not only conflicts with the plain language of the statute, but would render the statute unconstitutional in the face of the Fourteenth Amendment's unambiguous guarantee of "*equal* protection." Such an interpretation should not stand and the court of appeals' decision should be reversed. As this Court recently observed, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved*, 127 S. Ct. at 2768.

### B. The Court Of Appeals' Decision Would Promote The Use Of Prohibited Racial Quotas.

At bottom, this case provides both a prime example of Title VII disparate impact analysis run amuck, and an opportunity to clarify the law to allow employers to hire the most qualified candidates. Such a clarification is especially needed in the context of the public employment of emergency first responders—such as the firefighters denied promotion here—where it is within the urgent public interest to ensure that each position is filled with the best individual for the job.

The need for clarification is clear from this case,[3] as well as the seemingly interminable litigation in other large cities whenever a fire or police department attempts to fill vacant positions. *See, e.g., Kohlbek v. City of Omaha*, 447 F.3d 552

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[3] Although Petitioners raise legitimate questions about whether Respondents actually have a good faith belief that validating the test in this case would subject them to Title VII liability, we assume *arguendo* that Respondents' asserted concern, relied upon by the court of appeals, *see, e.g.*, Pet. App. 25a-26a, is genuine.

(8th Cir. 2006) (suit challenging fire department promotions); *Banos v. City of Chicago*, 398 F.3d 889 (7th Cir. 2005) (suit challenging police promotions); *Biondo v. City of Chicago*, 382 F.3d 680 (7th Cir. 2004) (suit challenging fire department promotions); *see also Williams*, 341 F.3d at 1269 (suit challenging fire department decision not to create new positions). This fear of endless litigation imposes an enormous tax on public safety agencies, and in many instances prevents them from filling necessary positions. *See also* James M. Conway, *Title VII and Competitive Testing*, 15 HOFSTRA L. REV. 299 (1987) (expressing concern about burden imposed on municipal employers by Title VII disparate impact theory and resulting incentives to engage in racial quotas). Five important clarifications of Title VII's disparate impact analysis could serve to allay these fears and free employers to hire the best qualified candidates.

*First*, the Court should make clear that in order to establish a prima facie case, a plaintiff must come forth with *scientifically reliable* evidence of disparate impact. *Cf. Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993). The *Watson* plurality implicitly recognized such a requirement when it maintained that plaintiffs must "offer statistical evidence *of a kind and degree* sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." 487 U.S. at 994 (emphasis added). Plaintiffs should not be allowed to proceed with litigation that is based on numerical analysis that is not "scientifically valid." *See Daubert*, 509 U.S. at 592-93. Plaintiff's analysis should be based on reliable data and methods, and the conclusions should flow logically from those facts and methods. *See id.* at 589-90. As this Court has made clear in the context of expert evidence, there must be a showing that the conclusions are both relevant and reliable: expert opinion must be excluded where "there is

simply too great an analytical gap between the data and the opinion proffered." *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

Applying these principles in the context of evidence submitted to demonstrate a disparate impact, it is clear that there must taken into consideration the composition of the relevant applicant pool. A reliable showing of disparate impact cannot ignore that the applicant pool is comprised disproportionately of candidates of races different from that of plaintiffs, for example. Simply showing that there is a disparity between the results of a particular testing procedure and the composition of the general population cannot be sufficient. Rather, in conducting an analysis one must take into account whether the results of a particular testing procedure have a disparate impact given the underlying applicant pool. *See Int'l Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 340 n.20 (1977) (recognizing that statistical evidence of disparate impact might be limited if there was a "showing that the figures for the general population might not accurately reflect the pool of qualified job applicants").

Likewise, a reliable statistical analysis should take into account other factors that may explain differences in the rates at which different groups are impacted by a particular policy. *See* George R. La Noue, *The Impact Of Croson On Equal Protection Law And Policy*, 61 ALB. L. REV. 1, 10 n.50 (1997) ("The validity of a conclusion about the existence of discrimination stemming from a statistical analysis is dependant on whether the analysis has controlled for variables that legitimately affect the outcome and are not discriminatory."); Kingsley R. Browne, *Statistical Proof Of Discrimination: Beyond "Damned Lies"*, 68 WASH. L. REV. 477, 541 (1993) ("[E]ven when one may confidently conclude that a disparity is so large that it must have been caused by nonchance factors, statistical inference provides no insight at all into whether the nonchance factor was an impermissible one, especially where the statistical analysis

contains only rudimentary control for relevant variables."). Thus, for example, a proper statistical analysis should not ignore differences in educational background or prior work experience. If one group has a disproportionate number of Ph.D.'s, for example, non-race-based factors may explain their higher passage rates.

Finally, a proper statistical analysis should not ignore artifacts caused by a small sample size. Here, for example, it appears that the number of African-American candidates taking the test was exceedingly small. Thus, the effect on overall passage rates for this group might be largely affected by a single member of the group. Such dynamics may dramatically skew the results. *See* Elaine W. Shoben, *Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII*, 91 HARV. L. REV. 793, 806-10 (1978).

These and other considerations should be part and parcel of any disparate impact analysis. Given the current state of the law, however, employers are left to guess concerning whether lawsuits may be allowed to proceed based on blatantly flawed and unreliable showings of disparate impact. This, in turn, gives employers an incentive to take actions that are, in themselves, discriminatory.

*Second*, the Court could elaborate upon the type of statistical evidence that is sufficient to establish a "disparate impact" within the meaning of 42 U.S.C. § 2000e-2(k)(1)(A)(i), and in particular reiterate the plurality statement in *Watson* that no "rigid mathematical formula" is sufficient to establish a prima facie case:

> [T]he plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group. Our formulations, which have never

> been framed in terms of any rigid mathematical formula, have consistently stressed that statistical disparities must be sufficiently substantial that they raise such an inference of causation.

487 U.S. at 994-95.

The "four-fifths rule" the court of appeals invoked here is just such an arbitrary and improper statistical test. *See* Pet. App. 27a (stating that employment test "presumptively had a disparate racial impact" based on four-fifths rule); *id.* at 38a (indicating that "a pass rate below the 'four-fifths rule[]' is sufficient to make out a prima facie case of discrimination."). The four-fifths rule only measures the difference in passage rates of the actual job candidates who took a particular test, which is a limited sample of the relevant population. *See* Shoben, *supra*, at 797-98.[4] Accordingly, it is not a test of statistical significance, and it becomes more inaccurate and less useful as the analyzed sample size decreases. *Id.* at 806-10. Because of these inaccuracies, many lower courts have specifically rejected the four-fifths rule as sufficient to establish a prima facie case of disparate impact. *See, e.g., Frazier v. Consolidated Rail Corp.*, 851 F.2d 1447, 1451-53 (D.C. Cir. 1988) (raw statistical data showing violation of four-fifths rule not sufficient to establish prima facie case); *Clady v. County of Los Angeles*, 770 F.2d 1421, 1428-29 (9th Cir. 1985) (applying statistical significance test rather than four-fifths rule).

*Third*, the Court should reiterate that statistical disparities alone do not constitute proof of discrimination. *See*

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[4] In this case, for example, the court of appeals found a violation of the four-fifths test based only on the small number of people who took the test. Pet. App. 26a-28a. Furthermore, apparently no attempt was made by Respondents to control for non-racial factors in studying the racial breakdown of the test results. *Id.* at 701a-702a.

*Washington v. Davis*, 426 U.S. 229, 242 (1976). Again, the *Watson* plurality is instructive, for it specifically "noted the danger that relying solely on statistical disparities as proof of discrimination under Title VII could result in the imposition of de facto quotas." *Lutheran Church-Missouri Synod v. FCC*, 154 F.3d 487, 494 (D.C. Cir. 1998) (citing *Watson*, 487 U.S. at 991-97). Recent experience in evaluating employment tests shows that it is virtually impossible to create a standardized test that does not have some disparate impact, even when more rigorous measures of statistical significance are used. *See* Michael Selmi, *Was the Disparate Impact Theory A Mistake?*, 53 U.C.L.A. L. REV. 701, 705 (2006) ("[T]he vast majority of [written employment] tests continue to have significant adverse impact."); Pet. App. 664a-665a (testimony of test creator about the ubiquity of adverse impact in all standardized tests). Accordingly, "[i]f avoiding disparate impact were a compelling government interest, then racial quotas in public employment would be the norm, and as a practical matter *Washington v. Davis* would be undone." *Biondo*, 382 F.3d at 684.

*Fourth*, this Court should reiterate its previous holding that a disparate impact plaintiff must "show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973)). Despite this Court's precedents, the court of appeals in this case allowed Respondents to take race-based remedial action without any evidence demonstrating the existence of non-discriminatory alternatives to the test they abandoned, and without even pinpointing any particular part of the test that might be altered to reduce its alleged disparate impact. Pet. App. 32a-34a.

*Finally*, the Court should make clear that, within the burden shifting framework set forth in 42 U.S.C. § 2000e-

2(k)(1)(A)(i), even where the defendant bears the burden of *production*, "the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times." *Watson*, 487 U.S. at 997 (plurality). This case provides a stark example of why allocating the burden of *proof* to defendants to establish the validity of a clearly job-related, professionally-developed test tends to encourage employers to adopt quotas and disregard the results of such tests, contrary to the intent clearly expressed by Congress in subsections (h), (j) & (l) of Title VII.

The current realities regarding standardized tests, combined with the current legal uncertainties regarding the level of statistical evidence that can establish a prima facie case of disparate impact and the allocation of burdens of production and proof, have created a situation where some employers understandably feel they must choose between implementing de facto racial quotas or facing a costly lawsuit. Respondents embrace this dilemma, and argue that it should excuse their decision to bar all promotions. *See, e.g.*, Br. In Opp. at 18 n.11 (asserting that practical difficulties of defending against a disparate impact suit justify the actions taken here). Instead of embracing such a perverse result, this Court should clarify Title VII disparate impact analysis to bring it in line with Congress's expressed intention to prohibit racial quotas while encouraging and protecting genuine professionally-developed, job-related employment tests.

## CONCLUSION

For the foregoing reasons, the court of appeals' decision should be reversed.

Respectfully submitted,

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